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No. 98 - 374

IN THE

Supreme Court of the United States

October Term 1997

Sun-Diamond Growers of California,
Cross-Petitioner,

v.

United States of America,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF THE ARGUMENT 1

REASONS FOR DENYING THE WRIT 1

I. The Imputation Question Does Not Merit Certiorari Review 1

II. The "Identifiable Harm from Wire Fraud" Issue Does Not Merit Certiorari Review 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: **Page**

New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 29 S.Ct. 304, 53 L.Ed. 613 (1909)..... 3

United States v. Cochran, 109 F.3d 660 (10th Cir. 1997)..... 6

United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997) . 6, 8

United States v. Frost, 125 F.3d 346 (6th Cir. 1997)..... 6

United States v. Jain, 93 F.3d 436 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 2452 (1997)..... 6

United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983)..... 6, 7, 8

United States v. One Parcel of Land Located at 7326 Highway 45 North, 965 F.2d 311, (7th Cir. 1992)..... 3

Statutes:

18 U.S.C. § 201(c)(1)(A) 1

18 U.S.C. § 1343 1

18 U.S.C. § 1346 5,8

Miscellaneous:

Restatement (Second) of Agency § 217 D, cmt. d (1958) 3

Restatement (Second) of Agency § 280 (1958) 3

SUMMARY OF THE ARGUMENT

Sun-Diamond's Cross-Petition for Writ of Certiorari presents no matters meriting review by this court. The issue of how the responsibility and knowledge of corporate officers should be imputed to a corporation is an esoteric question of general common law for which Sun-Diamond does not even attempt to identify a circuit split. The issue of what constitutes identifiable harm in the context of a wire fraud prosecution for deprivation of honest services likewise presents neither an important federal question, nor a circuit conflict, since Sun-Diamond concedes that all of the circuits that have considered the issue have done so correctly, and merely argues that the D.C. Circuit in the present case misread its own precedent. The Cross-Petition should therefore be denied.[1]

REASONS FOR DENYING THE WRIT

I. The Imputation Question Does Not Merit Certiorari Review

Sun-Diamond first urges this Court to consider the imputation of corporate responsibility and knowledge under the wire fraud statute.[2] It identifies nothing in the decision below meriting certiorari review.

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[1] It perhaps should be noted at the outset that there is no overlap between the Government's pending Petition for Writ of Certiorari and Sun-Diamond's Cross-Petition. The two address separate convictions under different statutes on distinct sets of facts. The Government's Petition concerns a conviction under 18 U.S.C. § 201(c)(1)(A) for illegal gratuities given to Secretary of Agriculture Espy. Sun-Diamond's Cross-Petition concerns a conviction under 18 U.S.C. § 1343 for wire fraud committed as part of a scheme to channel illegal contributions to the election campaign of the Secretary's brother. Likewise, the legal issues raised in the Petition and the Cross-Petition are wholly distinct.

[2] Cross-Pet. at pp. 10 -15, addressing Decision, Pet. App. at pp. 16-19. (In conformance with the Cross-Petition, the Government will cite to the

Sun-Diamond's statement of this issue is particularly puzzling, because it appears to have very little to do with the Court of Appeals' decision. In its statement of Questions Presented, Sun-Diamond asks whether a court deprives a criminal defendant of due process when it makes a ruling precluding a jury finding that the victim was actually a perpetrator.[3] But nowhere in its Cross-Petition does Sun-Diamond identify any ruling of either the District Court or the Court of Appeals that *precluded* the jury from finding as it did. Indeed, Sun-Diamond has not attacked the jury instructions that underlie its conviction, either in the Court of Appeals or here. Its argument therefore cannot be that the jury was *precluded* from finding in its favor on this issue, but rather that the jury should have found differently than it did, a matter clearly not meriting certiorari review.

Sun-Diamond does not even attempt to suggest that there is a split of authority among the circuits on this issue. It does not cite a single decision contrary to the one it is challenging; instead, it simply asserts that "the Court of Appeals created a distinction no other Circuit has seen fit to adopt." Cross-Pet. at p. 11. Nor, for that matter, does Sun-Diamond identify any authority supporting its position. Rather, it reports that it "has been unable to find . . . any authority describing the purported distinctions between perpetrators and victims in applying corporate imputation principles." Cross-Pet. at p. 12.

Indeed, Sun-Diamond does not point to any court, federal or state, that has ever had to address the peculiar fact situation that brought the imputation question before the

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version of the decision below included in the appendix to the Government's Petition for Certiorari.)

[3] "Whether a court deprives a criminal defendant corporation of due process of law when concluding that a *prosecutor's* classification of an entity as a 'victim' of an alleged fraud precludes a finding by a jury that the entity was actually a perpetrator under vicarious liability principles — thereby allowing the *prosecutor*, rather than the jury, to resolve a critical issue of fact?" Questions Presented, Cross-Pet. at p. i (emphasis in original).

Court of Appeals. Far from raising an important federal question, Sun-Diamond appears to be pursuing a question of general common law that has arisen in a unique factual setting.

Sun-Diamond nevertheless argues that the Court of Appeals committed an error of constitutional dimension when it held that there need not be a strict symmetry between the rule governing imputation of criminal liability to a corporate perpetrator for the acts of its agent, and the rule governing the imputation to a corporate victim of the knowledge of its agent.[4] The constitutional argument is a new one, presented for the first time to this Court. Before the Court of Appeals, "Sun-Diamond [did] not invoke the Constitution, which in any event would require either an overruling of the Supreme Court's rejection of a due process attack on corporate liability, *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 29 S.Ct.

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[4] Although this Court has no occasion to reach the merits of this issue, it is worth noting that the Court of Appeals' decision fully accorded with "general agency principles" — which, according to Sun-Diamond (Cross-Pet. at p. 12), are what govern here. An employer may be subject to criminal penalties for the act of a managerial person acting within the scope of employment, as Sun-Diamond's vice-president Douglas was doing. Restatement (Second) of Agency § 217 D, cmt. d (1958). On the other hand, if an agent has done an unauthorized act, as RLSM and Bozell's agent Lake did, then the principal is not affected by the agent's knowledge of the act. Restatement (Second) of Agency § 280 (1958). Thus, since unauthorized acts can be within an agent's scope of employment, it was entirely possible as a legal matter for Sun-Diamond to commit a fraud through its agent Douglas, who was acting within the scope of his employment, and at the same time for RLSM and Bozell to be defrauded by these activities, even though their disloyal agent Lake, who had not been authorized to make illegal campaign contributions, was aware of them. Compare, Sun-Diamond's authority *United States v. One Parcel of Land Located at 7326 Highway 45 North*, 965 F.2d 311, 316 (7th Cir. 1992), which holds that *only* knowledge obtained by an agent acting within the scope of employment is imputable, but not that *all* knowledge obtained by an agent acting within the scope of employment is imputable.

304, 53 L.Ed. 613 (1909), or the development of some new theory." Decision, Pet. App. at p. 18.

In pressing its new due process argument before this Court, Sun-Diamond never identifies the due process principle it thinks was violated. It does not point to a legal ruling of the district court, or to a jury instruction to which it objected, that barred it from presenting any legitimate defense at trial. Rather, Sun-Diamond disputes the jury's conclusion that it did, in fact, commit wire fraud to the detriment of RLSM and Bozell, and excoriates the Court of Appeals for not overturning the jury's determination of the facts in this case. Having failed to convince the Court of Appeals to substitute a new finding of facts for the jury's, it implores this Court to do so.[5]

In reality, as the Court of Appeals expressly held, there was a more than sufficient factual basis in the record for the jury to conclude that Douglas was acting to benefit Sun-Diamond — i.e., that he was acting within the scope of his employment — and that Sun-Diamond was, therefore, a perpetrator rather than a victim.[6] While Sun-Diamond asserts

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[5] The closest Sun-Diamond comes to identifying the due process problem that it wants this court to address is to allude to a supposed "inconsistency" in the Government's prosecution. It cites no authority for the proposition that a prosecutorial inconsistency rises to the level of a due process violation. But this Court would have no occasion to consider that issue here, because Sun-Diamond cannot point to any inconsistency. Instead, it complains that, although the Government prosecuted only Sun-Diamond, it "retained the right to prosecute Lake's firm" at an early stage of the investigation. Cross-Pet. at p. 13. But retaining this right following a single defendant's guilty plea — a right that the Government never exercised — was an act of prudence, not inconsistency, in light of the inherent uncertainty about what facts the investigation might ultimately reveal.

[6] "The facts in the record, however — that Douglas hid the illegal contribution scheme from others at the company and used company funds to accomplish it — do not preclude a valid finding that he undertook the scheme to benefit Sun-Diamond. Part of Douglas's job was to cultivate his, and Sun-Diamond's, relationship with Secretary Espy. By responding

that the Court of Appeals was "apparently bound by the Prosecutor's initial classification of Sun-Diamond as a perpetrator," Cross-Pet. at p. 13 (emphasis omitted), the Court of Appeals actually made a routine ruling that the evidence was sufficient to sustain the verdict that the jury reached.

Indeed, Sun-Diamond concedes that "[t]he flaw of the Court of Appeals' reasoning lies *not* in its declaration that the imputation rules are different for the perpetrator and the victim." Cross-Pet. at p. 15 (emphasis added). But that is the only issue of imputation that the Court of Appeals addressed. What Sun-Diamond purports to complain of — the "us[e] of that legal fiction for allocating criminal liability to identify the victim and the perpetrator" (*ibid.*) — is not a legal issue that the Court of Appeals even considered. There thus is simply nothing in the appellate decision below for this Court to review.

II. The "Identifiable Harm from Wire Fraud" Issue Does Not Merit Certiorari Review

Sun-Diamond next asks this Court to look at 18 U.S.C. § 1346, the "honest services" amendment to the wire and mail fraud statutes.[7] Specifically, it argues that the Court of Appeals erred in concluding that the Government established identifiable harm to the fraud victim by offering evidence that the victim would suffer foreseeable injury from exposure of the fraudulent scheme.

Again, the question Sun-Diamond presents for review has little, if anything, to do with the decision of the Court of Appeals. Sun-Diamond ultimately concedes that the

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to the Secretary's request to help his brother, Douglas may have been acting out of pure friendship, but the jury was entitled to conclude that he was acting instead, or also, with an intent (however befuddled) to further the interests of his employer. The scheme came at some cost to Sun-Diamond but it also promised some benefit." Decision, Pet. App. at pp.16-17.

[7] Cross-Pet. at pp. 16-24, addressing Decision, Pet. App. at pp. 22-25.

Government need only show that the defendant "reasonably contemplated" harm to the victim. Cross-Pet. at p. 19. Further, Sun-Diamond admits that the Court of Appeals was correct to conclude that defendant here could foresee harm to the victim. Cross-Pet. at p. 22. While Sun-Diamond does not like the jury's conclusion, it points to no legal error for this Court to review.

Unlike with its corporate imputation argument, Sun-Diamond at least looks for a circuit split in urging this Court to review this "identifiable harm from wire fraud" issue. It does not, however, find one. Sun-Diamond identifies several decisions from various circuits that supposedly conflict with the decision below.[8] Curiously, the seminal decision of this group, and the one upon which Sun-Diamond most heavily relies, is *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), a decision of the D.C. Circuit. All of the other circuits, Sun-Diamond asserts, are aligned with *Lemire*, and therefore at odds with the decision below.

Thus, Sun-Diamond does not complain of a circuit split; according to its argument, all of the circuits that have addressed the issue (including the D.C. Circuit in *Lemire*) are completely in accord. Rather, Sun-Diamond argues that the decision below conflicts with the Circuit's own earlier decision in *Lemire*.

But in the present case, the D.C. Circuit did not deviate from *Lemire*. To the contrary, it expressly adhered to *Lemire*, and cited that earlier decision repeatedly. *See*, Decision, Pet. App. at pp. 22-25. Indeed, according to Sun-Diamond, the key holding of *Lemire*, which it quotes twice in its Cross-Petition, is that Congress did not intend to "criminalize [every] intentional undisclosed breach of duty to an

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[8] *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983); *United States v. Cochran*, 109 F.3d 660, 667-68 (10th Cir. 1997); *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 2452 (1997); *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997); *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997).

employer." Cross-Pet. at p. 18. The Court of Appeals below was acutely aware of the policy arguments Sun-Diamond makes here; the court even quoted *Lemire* to the effect that "not every breach of a fiduciary duty works a criminal fraud." Decision, Pet. App. at p. 23 (quoting *Lemire*, 720 F.2d at 1335). Likewise, the Court of Appeals scrupulously adhered to *Lemire*'s direction that "[t]he crucial determination must be whether the jury could infer that the defendant *might reasonably have contemplated* some concrete business harm to his employer . . . ." Decision, Pet. App. at pp. 24-25 (quoting *Lemire*, 720 F.2d at 1337 (emphasis in *Sun-Diamond* decision, not in *Lemire* decision)).

Since the other circuits are in accord with *Lemire*, and since, according to the decision below, *Lemire* is still good law in the D.C. Circuit, even after the decision below, there can be no circuit conflict. Rather, Sun-Diamond argues that one decision of the D.C. Circuit erroneously interpreted an earlier decision of the same circuit. This is a matter for rehearing within the circuit, not for certiorari. (Sun-Diamond unsuccessfully petitioned the Court of Appeals for rehearing *en banc*.)

The potential business harm that the jury found and the Court of Appeals affirmed in the present case was the economic harm that would result to RLSM, a Washington public relations firm, from exposure of the fraudulent campaign contribution scheme. Decision, Pet. App. at p. 23. The Court of Appeals identified specific evidence supporting the conclusion that RLSM was particularly vulnerable to such injury:

> As Lake testified, the chief assets of a public relations firm are its legitimacy and credibility in the eyes of current and potential clients. Both stood to be undermined by Douglas and Lake's actions. There is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM once word of the scheme got out.

Decision, Pet. App. at p. 23.

Lemire, and the other decisions that Sun-Diamond asserts are contrary to the present one, did not identify any comparable evidence. When, as here, a firm's stock-in-trade is the effective and ethical handling of political matters, and the defendant induces the firm's executives to violate the election laws and thereby subject the firm to the risk of injury that exposure would entail, a jury certainly does not act irrationally in finding that the defendant has deprived the firm of the honest services of its employees.

These facts distinguish the present case from, for example, Sun-Diamond's other principal authority, *Czubinski*, *supra*, 106 F.3d 1069. Defendant there, an Internal Revenue Service employee, had browsed confidential taxpayer files, but had done nothing with the information he observed. The Court of Appeals overturned his conviction for wire fraud because neither actual nor potential harm to the public or his employer was shown:

> The conclusive consideration is that the government simply did not prove that Czubinski deprived, or intended to deprive, the public or his employer of their right to his honest services. Although he clearly committed wrongdoing in searching confidential information, there is no suggestion that he failed to carry out his official tasks adequately, or intended to do so.

Id. at 1077.

Sun-Diamond's Cross-Petition thus illustrates that no substantial disagreements regarding the interpretation of § 1346 have developed among the Courts of Appeals since the statute was enacted a decade ago. The development of the law on the subject to date simply gives no occasion for this Court to intervene.

Sun-Diamond also does not argue that the D.C. Circuit wrongly decided any important issue of federal law. Instead,

Sun-Diamond complains that "the Court of Appeals *assumed, without directly addressing the question*, that the reasonable foreseeability of possible harm resulting from an eventual *discovery* of the alleged fraudulent conduct is sufficient to convict a defendant of 'honest services' fraud." Cross-Pet. at p. 22 (emphasis added in part). Sun-Diamond would thus again have this Court address a question that, it concedes, the Court of Appeals did not consider.

Rather than arguing that the Court of Appeals wrongly decided this legal issue, Sun-Diamond merely asserts that the Court of Appeals proceeded from an inappropriate, although accurate, factual assumption. Specifically, while conceding the court was correct when it concluded that "[t]here is no doubt that Douglas and Lake could have foreseen that their actions would cause substantial economic harm to RLSM once word of the scheme got out," Decision, Pet. App. at pp. 23-24, Sun-Diamond says that the court should have looked for a different harm, because injury to reputation is just too commonplace.[9] But, beyond characterizing the harm as too mandane, Sun-Diamond cannot evade the conclusion that, under the facts in this case, the jury found the requisite harm to the victim within the defendant's reasonable contemplation, and the Court of Appeals noted ample evidence to support that conclusion. Since, as Sun-Diamond concedes, this is all the Government needed to show to prove honest services fraud, Sun-Diamond presents nothing for this Court to review.

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[9] "[I]t is difficult, if not impossible, to posit a scenario where the discovery of an employee's breach of fiduciary duty would not in some way harm the employer .... Accordingly, the Court of Appeals' holding ... conflicts with the federal circuits' respective efforts to narrow the scope, and limit the 'outer boundaries,' of 'honest services' fraud." Cross-Pet. at pp. 22-23.

CONCLUSION

Sun-Diamond's Cross-Petition quite effectively demonstrates why certiorari review is unwarranted here. There are no circuit conflicts to resolve, and no important questions of federal law that need answering. Instead, Sun-Diamond asks this Court to wade into esoteric questions of general common law and to weigh in on the interpretation of a federal statute for which the Courts of Appeals have been developing, without difficulty, a consistent body of law. Neither is a valid reason for granting a writ of certiorari.

Respectfully submitted,

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